

Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process

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Winter 2014 *Almost There* 149

Contents

Introduction.....	150
I. Unaccompanied Children and the Right to Counsel	151
A. The State of the Law	151
II. The Immigration Labyrinth.....	155
A. Apprehension and Placement.....	156
B. Removal Proceedings.....	159
III. Almost There: Current Needs and Coverage	162
IV. The Need for Counsel	163
A. Flores-Gonzalez v. Holder: A New Hope for Vulnerable Aliens	163
B. A Meaningful Opportunity to Participate in the Process ...	166
C. The Burden Is Not Too Great	169
Conclusion	170

Introduction

Congress has directed that the Department of Health and Human Services ("HHS"), the agency that oversees the care and custody of unaccompanied alien children, "ensure, to the greatest extent practicable...that all unaccompanied alien children . . . have counsel to represent them in legal proceedings."¹ Despite this directive, fewer than sixty percent of those children² in government custody will have the support of an attorney or legal representative to help them navigate their removal proceedings.³ Representation rates for children who are in the custody of someone other than the government are much worse.⁴ For many years, commentators, attorneys, activists, and unaccompanied alien children themselves have been advocating that Congress expand its directive and ensure that all unrepresented and unaccompanied alien children be appointed counsel at government expense if necessary.⁵

In June 2013, the United States Senate took a huge step towards this goal when it passed the Border Security, Economic Opportunity, and

¹ 8 U.S.C. § 1232(c)(5) (2012) (this directive applies to "all unaccompanied alien children who are or have been in the custody" of the HHS or the Secretary of Homeland Security).

² For the purposes of this essay, an unaccompanied alien child or unaccompanied child is any person under the age of 18 years old who is without legal immigration status and who was detained without a parent or legal guardian. See 6 U.S.C. § 279(g)(2) (2012).

³ *Halfway Home: Unaccompanied Children in Immigration Custody*, WOMEN'S REFUGEE COMM'N 23 (Feb. 2009), http://womensrefugeecommission.org/resources/doc_download/196-halfway-home-unaccompanied-children-in-immigration-custody [hereinafter Women's Comm'n]. Judges have recognized the complexity of the immigration system, explaining, "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' E. Hull, *Without Justice for All* 107 (1985). A lawyer is often the only person who could thread the labyrinth." *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th 1988).

⁴ Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children through the Immigration System* Vera Inst. of Justice 24 (March 2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

⁵ See e.g. Byrne & Miller, *supra* note 4; M. Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311 (2010). For an analysis of the argument unaccompanied children have a due process right to counsel, see Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Children*, 31 B.C. THIRD WORLD L.J. 41 (2011) [hereinafter Kelly Hill, *Right to be Heard*]. For the argument that these children have the same right under international law, see Brian Rowe, Comment, *The Child's Right to Legal Assistance in Removal Proceedings under International Law*, 10 CHI. J. INT'L L. 747 (2010).

Immigration Modernization Act.⁶ Included in this bill is a provision that mandates counsel for all unaccompanied alien children and other vulnerable aliens who are not represented by other counsel.⁷ This article advocates for the protection of unaccompanied alien children as the House of Representatives considers immigration reform. By mandating representation for unaccompanied children, Congress could protect these vulnerable children and their rights.

Part I of this article outlines the current state of the law as it relates to representation for unaccompanied children. Part II traces the complex immigration process, outlining why most unaccompanied children cannot meaningfully participate in that process without representation. Part III considers current needs and coverage and explains why current practices do not sufficiently meet unaccompanied children's needs. Finally, Part IV argues that guaranteeing representation for this vulnerable population is legally and economically sound.

I. Unaccompanied Children and the Right to Counsel

A. The State of the Law

Children aliens, as well as adult aliens, have the right to an attorney during their removal proceedings. The Immigration and Naturalization Act ("INA") provides that an alien has the right to an attorney during removal proceedings, but the government has no obligation to provide that attorney; "[i]n any removal proceedings before an immigration judge and in any appeal proceeding . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."⁸

Courts recognize the importance of this statutory privilege. While immigrants do not have a Sixth Amendment right to appointed counsel

⁶ S. 744, 113th Cong. (2013). On June 27, 2013, the bill passed the Senate with a vote of 68 to 32. S. 744, 113th Cong., Roll Call Vote 168 (2013), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168 (last visited Aug. 24, 2013).

⁷ *Id.* at § 3502(c).

⁸ 8 U.S.C. § 1362 (2012). *See also* 8 U.S.C. § 1229a(b)(4)(A) (2012). There is a disagreement about whether the phrase in parenthesis prohibits the government from providing attorneys or whether the government could voluntarily provide the attorneys if it chose to do so. Despite this disagreement, counsel is not generally appointed in these cases although funds are used for screening and *Know Your Rights* projects. Byrne & Miller, *supra* note 4, at 7.

because removal proceedings are civil in nature, these proceedings implicate Fifth Amendment due process concerns about fundamental fairness.⁹ Courts point out that representation by counsel ensures the fairness of the proceeding and that "the absence of counsel can change an alien's strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the alien is able to include in the record."¹⁰ The right to counsel is so important that an immigration judge must advise all aliens in removal proceedings of their right to representation and of the availability of free legal services.¹¹ If an official fails to advise an alien of that right, courts will generally find the resulting removal proceedings fundamentally unfair.¹²

Unaccompanied children also have to be advised of their right to retain counsel.¹³ In *Reno v. Flores*,¹⁴ a 1997 settlement agreement was

⁹ See *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004). Although courts have held that a removal proceeding is civil in nature, the Supreme Court has recognized that deportation is a penalty: "Though deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Commentators have argued that the distinction between criminal and civil proceedings for removal cases is murky at best, and that in the case of minors, the distinction is especially problematic: "A consequentialist analysis of removal proceedings suggest that the only difference between criminal violations and immigration violations are the reduced rights available at trial." Rowe, *supra* note 8, at 758. At any rate, immigration procedures must "conform . . . to traditional standards of fairness encompassed in due process law." *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). See *Montes-Lopez v. Holder*, 694 F.3d 1085, 1089 (9th Cir. 2012) (recognizing that denial of counsel or ineffective assistance of counsel in immigration proceedings may violate the Fifth Amendment).

¹⁰ *Montes-Lopez*, 694 F.3d at 1092.

¹¹ 8 C.F.R. § 1240.10 (a) (2013).

¹² See *Montes-Lopez*, 694 F.3d at 1090 for a discussion and list of cases. When a judge denies an alien access to counsel, the Fourth, Fifth, and Tenth Circuits require the alien to demonstrate prejudice on top of the denial. *Id.* at 1092. The Second, Third, Seventh, Ninth, and D.C. Circuits make no such requirement. *Id.* at 1090.

¹³ See 8 C.F.R. § 1240.10(a) (2013).

¹⁴ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), available at https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter *Flores Settlement Agreement*]. In 1985, a human rights organization, which worked directly with unaccompanied minors, sued the INS, alleging the detention conditions and release policies violated the minors' rights. *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *rev'd*, *Reno v. Flores*, 507 U.S. 292 (1993). As a result of that lawsuit, a settlement agreement was reached between the parties. "The Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS." *Flores Settlement Agreement* at 6. The

reached between the Immigrant and Naturalization Services (“INS”) and a class of unaccompanied children. The Flores Settlement Agreement establishes guidelines for the treatment of unaccompanied minors during detainment, release, and repatriation. The Agreement requires that each child placed in government custody receive the following: (1) a form that explains the removal process; (2) an explanation of the child's right to judicial review; and (3) a list of free legal services.¹⁵ The Flores Settlement Agreement does not require that unaccompanied children be provided with representation, but it helps ensure that children in custody know about their right to representation and how to contact pro bono attorneys.¹⁶

Congress seems to recognize an unaccompanied child's need for representation. Since 2002, Congress has been moving closer to ensuring that unaccompanied children have access to legal services by supporting and advancing pro bono projects to provide legal services to these children. For example, the Homeland Security Act of 2002 (“HSA”) mandated that the Office of Refugee Resettlement (“ORR”) develop a plan to provide counsel to children in removal proceedings that would “ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law.”¹⁷ “[C]onsistent with the law,” however, meant that attorneys had to be appointed “at no expense to the Government.”¹⁸ Initially, the ORR contracted with the Vera Institute of Justice to administer the Unaccompanied Children Pro Bono Project.¹⁹ This three-year pilot project developed and tested pro bono models to reach unaccompanied children.²⁰ The ORR has continued to work with the Vera Institute to develop

agreement required that the INS treat “all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.” *Id.* at 7. The Settlement is still in effect, despite the dissolution of the INS, but it has never been fully codified. Rebecca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1652 (2012).

¹⁵ Flores Settlement Agreement, *supra* note 14, at 15.

¹⁶ Currently, most children in ORR custody receive this information. That was not, however, always the case. A 2005 review by the DHS Office of the Inspector General found that while children were “generally” given a list of legal services, the list was not always up to date. DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS, OIG-05-45 at 12 (Sept. 2005), http://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf [hereinafter DHS Responsibility].

¹⁷ Homeland Security Act, 6 U.S.C. § 279(b)(1)(A) (2012).

¹⁸ See 8 U.S.C. § 1362 (2012).

¹⁹ Byrne & Miller, *supra* note 3, at 22.

²⁰ Byrne & Miller, *supra* note 4, at 22; Kelly Hill, *Right to be Heard*, *supra* note 5, at 48-49.

additional legal services and pro bono programs. However, the ORR is not able to directly provide attorneys to unaccompanied children.²¹

In 2008, Congress reauthorized the Trafficking Victim Protection Act of 2000.²² The William Wilberforce Trafficking Victim Protection Reauthorization Act ("TVPRA") was "the first statutory effort to ensure the safe repatriation of unaccompanied children."²³ The TVPRA outlines treatment standards for trafficked and unaccompanied children in custody, and it outlines the conditions for repatriation. Specifically, the Act requires that key agencies, including the Department of Homeland Security, the Office of the Secretary of State, the Office of the Attorney General, and the Department of Health and Human Services, work together to "develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence."²⁴

The Act also commands that the Department of Health and Human Services ("HHS") "ensure, to the greatest extent practicable," and consistent with the law, that all unaccompanied children "have counsel to represent them in legal proceedings" and to protect them from "mistreatment, exploitation, and trafficking."²⁵ To accomplish this, the TVPRA called on the HHS to "make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge."²⁶ The Act recognized the great need for legal

²¹ Byrne & Miller, *supra* note 4, at 23.

²² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

²³ Linda Kelly Hill, *The Right of Safe Repatriation for Unaccompanied Alien Children: Advancing the Intent of the Trafficking Victims Protection Reauthorization Act*, 12 LOY. J. PUB. INT. L. 85, 86-87 (2010) [hereinafter Kelly Hill, *Safe Repatriation*].

²⁴ 8 U.S.C. § 1232(a)(1) (2012). While more could be done, the TVPRA established safeguards for children who are deported. *Id.* For example, for unaccompanied Mexican children, the TVPRA requires that the Secretary of State negotiate with officials from Mexico with respect to the repatriation of children. The agreements must provide that no children will be repatriated unless they are returned to "appropriate employees or officials, including child welfare officials," 8 U.S.C. § 1232(a)(2)(C)(i) (2012), and returned during reasonable business hours, 8 U.S.C. § 1232(a)(2)(C)(ii) (2012). In addition, the HHS now has the authority to appoint child advocates to trafficking victims and other vulnerable unaccompanied children. Byrne & Miller, *supra* note 4, at 8.

²⁵ 8 U.S.C. § 1232(c)(5) (2012) (applies this command to all unaccompanied alien children except children from Mexico or Canada who can consent to their immediate removal).

²⁶ 8 U.S.C. § 1232(c)(5) (2012).

representation for unaccompanied children, but once again, it stopped short of ensuring counsel for all children.²⁷

II. The Immigration Labyrinth²⁸

Every year, tens of thousands of children are stopped at the border by United States Customs and Border Protection (“CBP”) officers.²⁹ Of those children, more than 17,000 are alone when they are apprehended.³⁰ Most children who make it across the border are apprehended shortly after their arrivals,³¹ and 7,000 to 9,000 of these children end up in the custody of the HHS through the ORR while they await the determination of whether they will be allowed to remain in the United States or whether they will be returned home.³² Once apprehended, the system can be as confusing as it is isolating for the unaccompanied children. As they are

²⁷ 8 U.S.C. § 1232(c)(5) (2012); Kelly Hill, *Right to be Heard*, *supra* note 5, at 51 (“Although the TVPRA recognizes the urgent need for advocates to represent the interests of unaccompanied alien children, it fails to implement the recommendation of the Women’s Commission that counsel be provided by statute for all children unable to secure paid or pro bono services.”).

²⁸ Kelly Hill, *Right to be Heard*, *supra* note 5, at 62 (“Unaccompanied alien children, like all unrepresented individuals, are severely handicapped by the complexity of immigration law. As many courts have suggested, the ‘labyrinth’ design of U.S. immigration law is so complicated that only an attorney can navigate it.”).

²⁹ Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 248 (2010) (explaining that most of the children were apprehended at the Mexico/United State border).

³⁰ Betsy Cavendish & Maru Cortazar, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, APPLESEED 16-17 (2012), <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf> [hereinafter Appleseed]. In 2012, one of every thirteen people apprehended at the border were under the age of 18, approximately 17 percent of those children were age 13 or younger. Sonia Nazario, Op-Ed., *Child Migrants, Alone in Court*, N.Y. TIMES, April 11, 2013, at A23.

³¹ Byrne & Miller, *supra* note 4, at 11. Approximately 80 percent of the kids are apprehended within one week of entering the United States. Unaccompanied children not apprehended at the border are apprehended at ports of entry, like airports, and a smaller number are apprehended by local or state police. *Id.*

³² Young & McKenna, *supra* note 29, at 248. Most children who enter the United States without lawful status will be deported or repatriated. Approximately 43,000 unaccompanied alien children are removed from the United States annually. Kelly Hill, *Safe Repatriation*, *supra* note 23, at 85. This number includes approximately 35,000 children who are voluntarily repatriated at the borders and 8,000 who are ordered removed. *Id.* at n.3.

moved between different agencies, unaccompanied children must navigate both the custodial system and the removal system.³³

A. *Apprehension and Placement*

More than half of the almost 30,000 children who were apprehended at the United States/Mexico border in fiscal year 2011 were unaccompanied.³⁴ The majority of unaccompanied children come from Guatemala, El Salvador, and Honduras, often travelling more than 1,000 miles to reach the United States/Mexico border.³⁵ Most unaccompanied children leave home and risk the journey in pursuit of family reunification, economic opportunities, or escape from violence or abuse.³⁶

When children are apprehended at the border or a port of entry, they are transferred to the custody of the Department of Homeland Security (“DHS”).³⁷ The DHS first determines whether the child fits within the statutory definition of an Unaccompanied Alien Child.³⁸ A person falls within that definition if he or she is younger than eighteen years old, is currently in the United States with no lawful immigration status, and is without a parent or legal guardian.³⁹ As many of the children

³³ Somers, Herrera & Rodriguez, *supra* note 5, at 333.

³⁴ Department of Homeland Security, Office of the Inspector General, *CBP's Handling of Unaccompanied Alien Children*, OIG-10-117, at 3 (Sept. 2010), http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf (last visited Aug. 23, 2013). During the first 11 months of 2010, 17,478 children were apprehended. Cavendish & Cortazar, *supra* note 30, at 17. In fiscal year 2009, 17,371 unaccompanied minors were apprehended. *Id.* at 16.

³⁵ Office of Refugee Resettlement, Unaccompanied Children Services, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last visited Aug. 24, 2013).

³⁶ Cavendish & Cortazar, *supra* note 30, at 13, 15-16 (explaining that each minor's reason for crossing the border is personal, but the Appleseed study found that most males crossed the border for economic reasons while females crossed the border to escape violence and abuse); *id.* at 15 (“A large percentage of these children are at risk of becoming victims of sex or labor trafficking. The risk factors for this type of victimization are numerous, including the three key elements that distinguish this population – their youth, their minimal level of education, and their separation from home or any other form of protective environment.”); *id.* at 16 (explaining that the majority of the unaccompanied minors who cross the border are male, but there are a significant number of females who cross as well); Byrne & Miller, *supra* note 4, at 33.

³⁷ *Id.* at 10. Initially, the children are placed in temporary DHS detention facilities, and they are not housed with unrelated adults. *Id.* At the border, a child is transferred to an Office of Border Patrol station for screening. DHS Responsibility, *supra* note 16, at 5.

³⁸ Byrne & Miller, *supra* note 4, at 11.

³⁹ 6 U.S.C. § 279(g)(2) (2012). Because a child's age may be hard to verify, some CBP agents will take the individual's word, unless it is entirely unbelievable. Appleseed, *supra* note 29, at 22. Other children are questioned vigorously about their age. In the past,

do not have papers or other forms of identification, DHS officers often find it difficult to determine age and immigration status. This determination, however, is extremely important because the officer's decision is not reviewable.⁴⁰ If an officer finds that a child does not fall within that definition, the child is immediately transferred to an Immigration Customs and Enforcement ("ICE") detention facility, where he or she is placed in removal proceedings.⁴¹ If an officer determines that a person is an Unaccompanied Alien Child, the child is interviewed, and with the assistance of the interviewing officer, the child fills out a series of immigration forms.⁴² The screening and status determination must be done within seventy-two hours of apprehension, as unaccompanied children should be transferred to the custody of the Division of Unaccompanied Children's Services ("DUCS") of the ORR.⁴³

some children were subjected to forensic age-determination techniques, such as radiographs and dental exams. *Id.*

⁴⁰ Somers, Herrera & Rodriguez, *supra* note 5, at 351.

⁴¹ *See* Somers, Herrera & Rodriguez, *supra* note 5, at 351. Unaccompanied children are not generally placed in expedited removal proceedings, but if they are sent to an ICE facility they may be. *Id.* Adult detention facilities are prison-like facilities where an immigrant may remain for months or years while awaiting deportation. Cavendish & Cortazar, *supra* note 30, at 22.

⁴² Byrne & Miller, *supra* note 4, at 10.

⁴³ 8 U.S.C. § 1232(b)(3) (2012). If a child's parent or other adult relative can be located in that time, the children may be released to them. Byrne & Miller, *supra* note 4, at 10.

For unaccompanied children from a contiguous country, Mexico or Canada, a second screening must be completed in that short time period. 8 U.S.C. § 1232(a)(4) (2012). These children are eligible for immediate voluntary removal. 8 U.S.C. § 1232(a)(2)(B) (2012). Recent reports suggest that the vast majority of unaccompanied Mexican children elect voluntary removal, Cavendish & Cortazar, *supra* note 30, at 17, although there are serious and genuine questions about whether these decisions are actually voluntary. *See* Somers, Herrera & Rodriguez, *supra* note 5, at 355.

Before a child can make this decision, the TVPRA requires that the child receive notice of his or her rights, 8 C.F.R. § 236.3(h) (2013), and must be told that he or she can select the voluntary removal or request a hearing before an immigration judge, 8 C.F.R. § 236.3(g) (2013); Byrne & Miller, *supra* note 4, at 10-11.

A child's decision to return home will be honored only if it is established that (1) the child is not a victim of a severe form trafficking, and there is no credible evidence that the child is at risk in the future; (2) the child does not fear returning home because of a credible fear of persecution; and (3) the child is able to make an independent decision to withdraw the child's application for admission to the United States. 8 U.S.C. § 1232(a)(2)(A) (2012).

This marks a change, though some commentators contend not a big enough change, from the policy in place before the passage of the TVPRA. Prior to the passage of the TVPRA, when unaccompanied children from Mexico or Canada were apprehended at their respective borders, they could be, and most often were, immediately returned to their

Once unaccompanied children are in the immigration system, they must navigate both the custodial and removal systems.⁴⁴ The ORR is responsible for the care and custody of unaccompanied children.⁴⁵ The HHS, and specifically the ORR, took over this duty from the Immigration and Naturalization Services (“INS”) when that agency was dissolved by the Homeland Security Act.⁴⁶ The dissolution of the Immigration and Naturalization Services was precipitated not only by the passage of the HSA, but also by complaints of mistreatment lodged against the INS, the agency that both cared for and prosecuted minors.⁴⁷

The Flores Settlement Agreement and the TVPRA direct the ORR to place unaccompanied children in the least restrictive setting as possible.⁴⁸ Beyond this mandate, ORR’s goal is to place the children with capable family members or other sponsors in the United States.⁴⁹ If a child

home countries. There was no investigation into whether the children were trafficked or whether the child could safely return home. Cavendish & McKenna, *supra* note 30, at 24.

⁴⁴ Somers, Herrera & Rodriguez, *supra* note 5, at 333.

⁴⁵ 6 U.S.C. § 279(a)-(b) (2012). The ORR is a social service agency. Areti Georgopoulos, Comment, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Children Detained by the United States*, 23 LAW & INEQ. 117, 135 (2005). Commentators agree that the ORR can meet the needs of these children better than the INS could. *See id.* On any given day in 2012, the ORR was caring for more than 2,100 unaccompanied children. Christopher Sherman, *Child Migrant Surge to U.S. Stresses Support System*, ADVOCATE (Baton Rouge, La.), April 30, 2012, at 11A.

⁴⁶ 6 U.S.C. § 279(a) (2012). *See* Young & McKenna, *supra* note 29, at 248. When the INS was dissolved, it was broken up into three divisions: Citizen and Immigration Services (USCIS), ICE, and CBP. Byrne & Miller, *supra* note 4, at 6. These agencies still have contact with unaccompanied minors and some control of the immigration process – mostly through apprehension, prosecution, and repatriation procedures – but for the most part, their duties are separate from the custodial duties of the ORR. DHS Responsibility, *supra* note 16, at 6. The use of these different agencies shows the tension between the humanitarian needs of unaccompanied minors and the law enforcement goals of the United States. Chad C. Haddal, *Unaccompanied Alien Children: Policies and Issues*, CRS Report for Congress (March 1, 2007), http://www.uscerefugees.org/2010Website/5_Resources/5_3_For_Service_Providers/5_3_2_Working_with_Refugee_and_Immigrant_Children/CongressionalResearchService.pdf.

⁴⁷ *See* Flores Settlement Agreement, *supra* note 14. While most commentators agree that the transfer of custody was for the best, problems, including abuse, persist at some custodial facilities. Women's Comm'n, *supra* note 2, at 38.

⁴⁸ Flores Settlement Agreement, *supra* note 14; 8 U.S.C. § 1232(c)(2)(A) (2012).

⁴⁹ Flores Settlement Agreement, *supra* note 14, at 7; *see* 8 U.S.C. § 1232(c) (2012). The placement must be in the least restrictive setting that is in the best interest of the child. Flores Settlement Agreement, *supra* note 13, at 7. This is the first time the best interest standard has been used in a federal statute regarding unaccompanied minors. Somers, Herrera & Rodriguez, *supra* note 5, at 357. A search for a parent, family member, or other sponsor begins almost immediately. Byrne & Miller, *supra* note 4, at 17. Social

can live safely with a family member or sponsor, the ORR relinquishes care and control to that person. Over half of the children—about sixty-five percent—are ultimately placed with a family member or sponsor.⁵⁰ For those children who cannot be safely returned to a family member, the ORR has a number of care facilities throughout the United States.⁵¹ On average, unaccompanied children stay in DUCS/ORR care for sixty-one days. Most children stayed between one week and four months, but some children may end up staying in custody for more than one year.⁵²

B. Removal Proceedings

Once it is determined that a child is an Unaccompanied Alien Child, ICE starts the removal proceeding on behalf of the DHS.⁵³ Unaccompanied alien children will be removed, either voluntarily or involuntarily, or the children will be permitted to stay under a relief option.⁵⁴

Most unaccompanied children are placed in removal proceedings under section 240 of the INA.⁵⁵ In these proceedings, a judge will determine if the child is inadmissible under section 212(a)⁵⁶ for reasons

workers do a complete history and a psychosocial assessment for each child. *Id.* An individualized service plan is in place within 21 days. *Id.*

⁵⁰ Byrne & Miller, *supra* note 4, at 17.

⁵¹ The facilities range from group homes to secure detention facilities. Appleseed, *supra* note 29, at 27. The children who remain in ORR care must be treated with "dignity, respect and special concern for their particular vulnerability as minors." Flores Settlement Agreement, *supra* note 14, at 7. During their stays with ORR, the minors should be permitted access to educational programs, medical and mental health treatment, recreational facilities, and social welfare services. Cavendish & McKenna, *supra* note 30, at 27.

⁵² Byrne & Miller, *supra* note 4, at 17. The report indicates that while stays averaged sixty-one days, the range was between one and 710 days. *Id.* at 17.

⁵³ 8 U.S.C. § 1232(a)(5)(D)(i) (2012); *see* Byrne & Miller, *supra* note 4, at 12. The removal petition is filed at the immigration court that is closest to each child's placement. Byrne & Miller, *supra* note 3, at 22.

⁵⁴ *See* Immigration and Naturalization Act § 240, 8 U.S.C. § 1229a (2012).

⁵⁵ 8 U.S.C. § 1232(a)(5)(D)(i) (2012). *See* Raya Jarawan, Comment, *Young, Illegal, and Unaccompanied: One Step Short of Legal Protection*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUS. 125, 134 (2007). Unaccompanied children are generally not approved for expedited removal unless they already have an order of removal against them or if they have an extensive criminal history. Haddal, *supra* note 46, at 8; *see* 8 U.S.C. § 1229a (2012).

⁵⁶ Immigration and Naturalization Act § 212(a), 8 U.S.C. § 1182 (2012) (requires that aliens are ineligible for entry for reasons including the following: if the alien's health poses a threat to others, if the alien has been convicted of certain crimes, if the alien poses a threat to national security, if there is a danger that the alien will become a public

ranging from health to national security concerns. A judge will also determine if there are any grounds for deportation under section 237(a),⁵⁷ which considers, among other things, criminal history and immigration fraud.⁵⁸ Children must establish that they are not inadmissible under either section or that they qualify for a substantive ground for relief from removal. Available substantive grounds for relief include Special Immigrant Juvenile Status (“SIJS”), asylum, T-Visas, and U-Visas.

Each one of these substantive grounds for relief requires specific evidence and a specific legal argument. For example, to qualify for SIJS, unaccompanied children must show that they cannot be reunited with their parents or guardians because of abuse, neglect, or abandonment, and that it is not in the children's best interest to be returned.⁵⁹ This complicated process requires the child to be declared a dependent in the state juvenile court, requiring the child to navigate both state and immigration court systems.⁶⁰ A child may apply for asylum based upon a well-founded fear of persecution in his or her home country based on race, religion, nationality, political opinion, or membership in a particular social group.⁶¹ Children might also be entitled to T-visas if they can show they were victims of a severe form of trafficking (sex trade or forced labor), they are

charge, if the alien has violated his or her immigration status in the past, or if the alien had been previously removed from the country).

⁵⁷ Immigration and Naturalization Act § 237, 8 U.S.C. § 1227(a) (2012) (requires that an alien is deportable for reasons including the following: the alien is presently in violation of immigration laws, the alien violated his or her nonimmigrant status or condition of entry, the alien was convicted of certain crimes, the alien was involved in fraud related to his or her immigration status, or the alien poses a threat to national security).

⁵⁸ 8 U.S.C. § 1229a(a)(2) (2012).

⁵⁹ 8 U.S.C. § 1101(a)(27)(J) (2012); 8 C.F.R. § 204.11(c) (2013).

⁶⁰ Byrne & Miller, *supra* note 4, at 26. In fiscal year 2009, 1,144 children were granted permanent residence through this process. Appleseed, *supra* note 29, at 28. Once a child obtains SIJS, he can usually obtain a status adjustment to become a legal permanent resident. *Id.*

⁶¹ 8 U.S.C. § 1101(a)(42) (2012). For children, most forms of persecution are inflicted by non-state actors, so few children have valid asylum claims. Young & McKenna, *supra* note 29, at 254. Even those that have valid claims may not receive asylum because without legal assistance, children are often unable to explain how their experiences were persecution or explain why their home country conditions contribute to their persecution. *Id.* The TVPRA has attempted to make the asylum process for unaccompanied minors more child-friendly. Cavendish & McKenna, *supra* note 30, at 28. While the substantive requirements for asylum have not changed, the TVPRA gave initial jurisdiction of all unaccompanied minor asylum applications to United States Citizenship and Immigration Services, rather than the adversarial immigration court. *Id.* If a minor is granted asylum, he can obtain benefits from ORR, apply for permanent residency and citizenship. *Id.*

in the United States because of the trafficking, and they would suffer extreme hardship involving unusual and severe harm if removed.⁶²

Unaccompanied children may also qualify for U-Visas if they were crime victims who suffered abuse and are willing to assist law enforcement officials.⁶³ A court may grant a withholding of the removal process under section 241(b)(3) of the INA for children whose lives or freedoms would be threatened because of their race, religion, nationality, membership in a particular social group, or political opinion if they were returned to their home countries.⁶⁴ In addition, removal of unaccompanied children is prohibited to countries where torture is likely.⁶⁵ Further, unaccompanied alien children who have been reunited with their families may have family-based immigration claims. For any relief claim to be successful, the unrepresented child is required to produce specific evidence and make specific legal arguments.

Whichever claim an unaccompanied child may have, the INA would provide each unaccompanied child in removal proceedings with a meaningful opportunity to participate in that process.⁶⁶ Throughout the proceedings, the child "shall have a reasonable opportunity to examine the evidence against [him or her], to present evidence on [his or her] own behalf, and to cross examine witnesses presented by the Government."⁶⁷ A meaningful opportunity to participate is important because throughout the proceedings the child carries the burden of proof. Unaccompanied children may meet this burden in one of two ways. The children may prove "clearly

⁶² 8 U.S.C. § 1101(a)(15)(T) (2012). Permanent residency is not automatic, but it is likely. Cavendish & Cortazar, *supra* note 30, at 28.

⁶³ 8 U.S.C. § 1101(a)(15)(U) (2012). See Cavendish & McKenna, *supra* note 30, at 29.

⁶⁴ Immigration and Naturalization Act § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012). Unlike an alien who qualifies for asylum, an alien who qualifies for withholding of removal under section 3 may not later petition for permanent residency or citizenship. Fact Sheet, Executive Office for Immigration Review, Asylum and Withholding of Removal Relief, Convention Against Torture Protections: *Relief and Protections Based on Fear of Persecution* 1, 6 (Jan. 5, 2009), available at <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf> (last visited Nov. 22, 2013). Further, the standard of proof is different for the two forms of relief: well founded fear for asylum, *id.* at 1, and more likely than not for relief under section 3, *id.* at 6.

⁶⁵ See 8 C.F.R. § 208.16(c) (2013); 8 C.F.R. § 208.17 (2013).

⁶⁶ See 8 U.S.C. § 1229a(b)(4)(B) (2012); Franco-Gonzalez v. Holder, No. 10-02211, at 14 (C.D. Cal. 2013) (Order re Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motion for Preliminary Injunction on Behalf of Seven Class Members, Doc. 592), available at <http://nwirp.org/Documents/PressReleases/DistrictCourtOrderonFrancov.Holder04-23-2013.pdf> (last visited Aug. 23, 2013).

⁶⁷ 8 U.S.C. § 1229a(b)(4)(B) (2012).

and beyond doubt" that they are entitled to be admitted to the United States and are not inadmissible.⁶⁸ The children may also meet the burden by establishing by "clear and convincing evidence" that they are lawfully present in the United States.⁶⁹ If a child requests relief or protection from removal, the child bears the burden of proving that he or she has satisfied the "applicable eligibility requirements" and merit a "favorable exercise of discretion."⁷⁰

An unaccompanied child must make his or her case before an immigration judge.⁷¹ The judge receives evidence and interrogates or examines the child and any witnesses the child may have.⁷² The immigration judge's decisions must be based only on the evidence produced during the hearing, which means the court may consider only evidence the unaccompanied and unrepresented child is capable of producing.⁷³

III. Almost There: Current Needs and Coverage

The removal process is daunting. Each of the available forms of relief available to unaccompanied children has its own procedural and substantive rules. An unaccompanied child needs an attorney to 'thread the labyrinth' and participate meaningfully in the process.

A number of public and private organizations work to meet the minors' needs. The programs that are currently in place reach a large number of children who remain in the custody of ORR during their immigration proceedings.⁷⁴ The ORR has relied on an in-house project and a network of pro bono programs to fulfill its statutory duty under the TVPRA.⁷⁵ The Vera Institute of Justice, working in conjunction with ORR, runs the DUCS Access to Legal and Child Advocate Services Project ("DUCS Legal Access Project").⁷⁶ This project provides a majority of the kids in ORR custody with *Know your Rights* seminars, legal screenings, and court preparation and assistance, but does not provide representation.⁷⁷ Some unaccompanied children receive pro bono

⁶⁸ 8 U.S.C. § 1229a(c)(2)(A) (2012).

⁶⁹ 8 U.S.C. § 1229a(c)(2)(B) (2012).

⁷⁰ 8 U.S.C. § 1229a(c)(4)(A) (2012).

⁷¹ 8 U.S.C. § 1229a(a)(1) (2012).

⁷² 8 U.S.C. § 1229a(b)(1) (2012).

⁷³ 8 U.S.C. § 1229a(c)(1)(A) (2012).

⁷⁴ Byrne & Miller, *supra* note 4, at 23.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Winter 2014

Almost There

163

legal representation from agencies that contract with DUCS Legal Access Project.⁷⁸ Each year, this project reaches approximately 7,000 kids in ORR custody.⁷⁹ Seventy percent of children whose cases concluded while in ORR custody received some direct legal assistance.⁸⁰

While those numbers are impressive, almost thirty percent of children in ORR custody did not receive direct legal assistance. Those numbers do not include unaccompanied children who are no longer in ORR care. Children in the custody of family members or other sponsors are not represented as often as children in ORR care.⁸¹ Few children in the custody of family members or sponsors receive services through DUCS Legal Access Project, and only a small number are screened and matched with pro bono attorneys.⁸² The lack of direct legal representation for a large percentage of unaccompanied children suggests that reliance on pro bono and pro se services "is not an effective mechanism for ensuring the representation of all children in custody."⁸³

IV. The Need for Counsel

Legal representation is a necessity for all unaccompanied children. Directives that urge representation, but limit that representation to pro bono programs, leave a particularly vulnerable population without an adequate opportunity to access the protections it needs. Providing representation is both legally and economically sound because it would allow unaccompanied alien children to meaningfully participate in their removal proceedings and it would not place an undue burden on the government.

A. Flores-Gonzalez v. Holder: A New Hope for Vulnerable Aliens

Recently, a United States District Court held that a different class of vulnerable aliens in removal proceedings was entitled to appointed counsel at government expense if necessary.⁸⁴ In April 2013, Judge Dolly

⁷⁸ Byrne & Miller, *supra* note 4, at 23-24. Alien children cannot be directly represented by utilizing DUCS Legal Access Project funds. Somers, Herrera & Rodriguez, *supra* note 5, at 366-67.

⁷⁹ Byrne & Miller, *supra* note 4, at 23-24.

⁸⁰ *Id.* at 24.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Kelly Hill, *Right to be Heard*, *supra* note 5, at 50, citing Women's Comm'n, *supra* note 2, at 23.

⁸⁴ *Franco-Gonzalez v. Holder*, No. 10-02211 (C.D. Cal. 2013) (Order re Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motion for Preliminary Injunction

Gee, from the Central District of California, ordered the government to provide legal representation to aliens who are mentally incompetent to represent themselves in removal proceedings in the states of California, Washington, and Arizona.⁸⁵ A few days earlier, the Department of Justice, anticipating the court's ruling, outlined new guidelines for mentally incompetent aliens in removal proceedings, which included considerations for the appointment of counsel.⁸⁶

The plaintiffs were a class of mentally disabled immigrants from these three states who were awaiting their removal proceedings and who had been held in custody without counsel.⁸⁷ The plaintiffs maintained they were entitled to counsel under the INA, pursuant to the Due Process Clause of the Fifth Amendment, and pursuant to section 504 of the Rehabilitation Act.⁸⁸ The plaintiffs argued that without counsel, they had no opportunity to meaningfully participate in their removal proceedings.⁸⁹ The plaintiffs moved for summary judgment and the court granted partial summary judgment on the Rehabilitation Act claim.⁹⁰ The court did not

on Behalf of Seven Class Members, Doc. 592), available at <http://nwirp.org/Documents/PressReleases/DistrictCourtOrderonFrancov.Holder04-23-2013.pdf> (last visited Aug. 23, 2013).

⁸⁵ *Id.*

⁸⁶ Memorandum from John Morton, Director, Executive Office for Immigration Review, U.S. Dept. of Justice, to All Immigration Judges, Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions (April 22, 2013), available at <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf> (last visited Aug. 23, 2013).

⁸⁷ *Franco-Gonzalez*, No. 10-02211, at 3 (The plaintiffs' sub-class were "[i]ndividuals [who are or will be in DHS custody for removal proceedings] who have a serious mental disorder or defect that renders them incompetent to represent themselves in detention or removal proceedings.").

⁸⁸ *Id.* at 4. The plaintiffs claimed representation under section 504 of the Rehabilitation Act, which provides "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in . . . any programs . . . conducted by any Executive agency." 29 U.S.C. § 794 (2012). They also claimed the right to representation under the INA. *See* 8 U.S.C. § 1362 (2012) and 8 U.S.C. § 1229a(b)(4)(A) (2012).

⁸⁹ *Franco-Gonzalez*, No. 10-02211, at 6.

⁹⁰ *Id.* at 17. In addition to the claims they were entitled to representation, the plaintiffs also argued that under the INA, the Rehabilitation Act, and the Due Process Clause of the Fifth Amendment, they were entitled to detention hearings. *Id.* at 4. To establish a *prima facie* case under the Rehabilitation Act, the plaintiffs had to establish (1) they were "persons with disabilities within the meaning of the Rehabilitation Act; (2) they were 'otherwise qualified for the benefit or services sought'; (3) they were 'denied the benefit or services solely by reason' of their disability; and (4) the entity to provide the benefit receives federal funding." *Id.* at 6, *citing* *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

determine whether the plaintiffs were entitled to appointment counsel under the INA or the due process clause.⁹¹

The court found that, without representation, the plaintiffs were unable to exercise their rights and meaningfully participate in their removal proceedings because of their mental disability.⁹² Representation was the only meaningful way they would be able to invoke their rights.⁹³

Further, the court explained that providing representation would not be cost prohibitive because there would be a cost to the government only when pro bono or other free or low-cost attorneys were unable to be engaged.⁹⁴ In addition, the Executive Office for Immigration Review's regulations already contemplate the government providing non-attorney assistance to the aliens, so providing legal assistance would not be a great burden on the government.⁹⁵

The court rejected the Government's argument that appointed counsel would put the plaintiffs in a significantly better position than non-disabled detained aliens and explained that "those who are in full possession of their faculties already have the ability to participate in immigration proceedings or, at least, have the wherewithal to obtain access."⁹⁶ While all immigrants are statutorily granted the opportunity to examine and present evidence, the court explained that opportunity was out of reach for this class of plaintiffs.⁹⁷ In addition, the court explained that representation from individuals who were not qualified representatives was insufficient because non-attorney advocates could lack the expertise or accountability to ensure each plaintiff's full and meaningful participation in the removal proceedings.⁹⁸ The court

⁹¹ *Franco-Gonzalez*, No. 10-02211, at 18. According to the court, the defendant admitted that while the INA cannot be read to prohibit the appointment of counsel in all circumstances, the plaintiffs failed to show that the statute required it. *Id.*

⁹² *Id.* at 8.

⁹³ *Id.* at 10.

⁹⁴ *Id.* at 10-12. The court's order contemplated that representation could be undertaken by a qualified representative. Qualified representatives include (1) licensed attorneys, (2) law students or law graduates directly supervised by a faculty member or a licensed attorney, or (3) an accredited representative. *Id.* at 10; see 8 C.F.R. § 1292.1 (2013).

⁹⁵ *Franco-Gonzalez*, No. 10-02211, at 11-12. For example, interpreters are provided at the government's expense to any alien whose command of English is inadequate to fully understand and participate in removal proceedings, *id.* at 15, and immigration judges are required to employ safeguards to protect the rights and privileges of mentally incompetent aliens, *id.* at 14-15. See 8 U.S.C. § 1229a(b)(3) (2012).

⁹⁶ *Franco-Gonzalez*, No. 10-02211, at 14.

⁹⁷ *Id.*

⁹⁸ *Id.* at 16-17.

questioned whether these plaintiffs could validly consent to representation by a non-attorney.⁹⁹

Although unaccompanied alien children are not, as a class, entitled to the protections of the Rehabilitation Act,¹⁰⁰ many of the reasons the court found to require the appointment of counsel for the plaintiffs in *Franco-Gonzalez* also apply to the class of unaccompanied children. With representation, unaccompanied children would be able to more meaningfully participate in their removal proceedings and the burden placed on the government would not be onerous.

B. A Meaningful Opportunity to Participate in the Process

To state the obvious, unaccompanied children need legal assistance. In 2010, an estimated forty percent of children in the DUCS Legal Access Project were identified as potentially eligible for some form of relief from removal.¹⁰¹ This means that at least 3,000 children in the custody of the government had non-frivolous claims that needed to be heard by an immigration judge. Without representation, unaccompanied children have low success rates. They are expected, but unable, to determine what type of relief they might be entitled to, gather evidence and witnesses that establish they are entitled to the relief, and present that evidence to the immigration judge in a way that "clearly and beyond doubt"¹⁰² establishes that they are entitled to that relief.¹⁰³ In other words, without representation, many unaccompanied children are unable to meaningfully participate in their removal proceedings.

Evidence suggests that with the aid of attorneys, children who are entitled to relief will have greater success.¹⁰⁴ For example, in asylum proceedings, children with counsel are "more than four times as likely to

⁹⁹ *Id.* at 16-17 n.12, citing *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133, 1145-46 (C.D. Cal. May 4, 2011).

¹⁰⁰ See Rehabilitation Act § 504, 29 U.S.C. § 794 (2012). An 'individual with a disability' is a person who has a physical or mental impairment that results in a substantial impediment to employment. 29 U.S.C. § 705(20) (2012).

¹⁰¹ Byrne & Miller, *supra* note 4, at 24-25. Numbers are more difficult to come by for the sixty-five percent of children placed with family members or sponsors.

¹⁰² See 8 U.S.C. § 1229a(c)(2)(A) (2012).

¹⁰³ Kelly Hill, *Right to be Heard*, *supra* note 5, at 60.

¹⁰⁴ Cavendish & McKenna, *supra* note 30, at 27. A 2003 study showed that thirty-four percent of all non-detained immigrants who had legal representation won their cases; only twenty-three percent of those without counsel were successful. Jarawan, *supra* note 55, at 132. In asylum cases, 39 percent of aliens with counsel were granted asylum; only fourteen percent of those without counsel were. *Id.*

be granted asylum" as those without representation.¹⁰⁵ Further, unaccompanied children in removal proceedings who are represented are less likely to be deported than children who represent themselves.¹⁰⁶

Unaccompanied alien children, like the plaintiffs in *Franco-Gonzalez*, need legal assistance to exercise their rights. Unaccompanied children, including youth ranging in age from infancy to seventeen years old, cannot meaningfully participate in their removal proceedings because of their minority. Children and adolescents process information and make decisions differently than competent adults.¹⁰⁷ Because of their age, lack of education, and lack of experience, "teens are less likely than adults to be cognizant of all of their options, to recognize or appreciate all of the ramifications of behavioral alternatives and to weigh the alternatives in a way that does not produce outcomes that may be unfavorable or even injurious to them."¹⁰⁸ A trained legal representative could help unaccompanied children both understand and weigh their options.

Immigration law has recognized the vulnerability of minors and that minority status can be its own form of legal disability. For example, the regulation outlining the filing deadlines for asylum claims indicates that unaccompanied minors have a legal disability that tolls the time for filing an application.¹⁰⁹ Even when minority status is not recognized as a disability, immigration law recognizes that unaccompanied children are particularly vulnerable in ways that competent adult immigrants are not.¹¹⁰ The Flores Settlement Agreement articulates this concern when it commands that unaccompanied children be treated "with dignity, respect and special concern for their particular vulnerability as minors."¹¹¹ Similarly, the Executive Office for Immigration Review issued guidelines for immigration courts that recognize the challenges in adjudicating an unaccompanied child's case. These guidelines mandate that immigration judges consider the child's understanding of the nature of removal

¹⁰⁵ Jarawan, *supra* note 52, at 132.

¹⁰⁶ *See supra* note 104.

¹⁰⁷ *See* Donna M. Bishop & Hillary B. Farber, Symposium, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 RUTGERS L. REV. 125, 149 (2007).

¹⁰⁸ *Id.* at 151.

¹⁰⁹ 8 C.F.R. § 208.4(a)(5)(ii) (2013). *See* Jarawan, *supra* note 55, at 134.

¹¹⁰ *See* Flores Settlement Agreement, *supra* note 14, at 7; TVPRA 8 U.S.C. § 1232 (2012).

¹¹¹ Flores Settlement Agreement, *supra* note 14, at 7; Cavendish & Cortazar, *supra* note 30, at 22.

proceedings and the child's ability to present evidence in light of the child's age, development, experience, and self-determination.¹¹²

Some unaccompanied alien children are unable to meaningfully participate because they have been victims of abuse, violence, or trafficking, which can greatly undercut their ability to produce evidence to support their claims.¹¹³ An attorney would be able to speak on behalf of children when they cannot or will not talk about what happened to them. The attorney would also be able to organize and gather evidence in a way that does not re-victimize any abused or trafficked children.

The appointment of counsel would make the process fairer: those who are entitled to relief would receive it and the process for all unaccompanied children would be expedited. When an unaccompanied child appears pro se at his removal proceeding, the immigration judge often finds herself forced to help the child develop her case while at the same time acting as a fact-finder and adjudicator.¹¹⁴ When a judge wears too many hats, the fairness of the process is put in jeopardy. In fact, judges have indicated that the lack of representation for these children is frustrating and that the process slows down because of it.¹¹⁵ The slowdown has created a backlog of cases; recent sequestration cuts are likely to further slow the process.¹¹⁶ Because of the deprivation unaccompanied children risk by being removed from the country,¹¹⁷ it is

¹¹² Memorandum from David Neal, Chief Immigration Judge, to All Immigration Judges, U.S. Department of Justice, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 3-4 (May 22, 2007), available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (last visited Aug. 23, 2013). See Somers, Herrera & Rodriguez, *supra* note 5, at 365.

¹¹³ See Joyce Koo Dalrymple, Comment, *Seeking Asylum Alone: Using the Best Interest of the Children Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 141 (2006) (Explaining "traumatic events may affect unaccompanied minors more profoundly than other children because they cannot turn to those they usually depend on for support and, thus, likely experience intensified and often unmitigated emotional and psychological distress.").

¹¹⁴ Kelly Hill, *Right to be Heard*, *supra* note 5, at 62.

¹¹⁵ Haddal, *supra* note 46, at 15. In fact, Immigration Judges "strongly encouraged" pro bono representation when a child is not represented. News Release, U.S. Department of Justice, Executive Office for Immigration Review, Unaccompanied Children in Immigration Proceedings (April 22, 2008), available at <http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf> (last visited Aug. 23, 2013).

¹¹⁶ See Suzy Khimm, *How the Sequester Would Affect Our Dysfunctional Immigration System*, WASH. POST, Feb. 24, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/24/sequester-would-make-our-immigration-system-more-dysfunctional/> (last visited Aug. 24, 2013).

¹¹⁷ See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

important that they be in a position to present relevant information in a way that would allow the immigration judge to make a legally sound decision. When judges cannot adequately communicate with the children or when judges have to find the relevant evidence themselves, the judges are not getting the information they needs to make a legally sound decision for the children. Representation in these proceedings would help ensure that each proceeding was fair and that each child was properly heard by a judge.

These children also need an attorney to protect their legal interests beyond the success of their removal proceeding.¹¹⁸ Unaccompanied children placed in the custody of the ORR are alone. Children who are placed with family members and sponsors might not be alone, but they, like the children placed with the ORR, have been removed from a familiar environment. Lawyers can advocate for children who are not, or do not, believe they are placed in the most appropriate setting. They can also ensure their clients receive the necessary services and resources to which they are entitled. As a number of unaccompanied children were victims of violence, abuse, or trafficking, they may need protection from those who perpetrated the abuse or they may need services to help them deal with the abuse. Child advocates work to ensure these needs are met, but an attorney can help a child *enforce* these rights in a way that a non-attorney advocate cannot.¹¹⁹

C. The Burden Is Not Too Great

While the appointment of counsel may initially result in an additional cost to the government, it can create a more time and cost-effective system. The Justice Department has pointed out that the appointment of counsel for mentally incompetent aliens would ultimately save money by reducing prolonged detention.¹²⁰ The same savings could be seen if the children in government custody spend less time in that custody. As attorneys are trained to focus on viable claims, it is likely that there would

¹¹⁸ Kelly Hill, *Right to be Heard*, *supra* note 5, at 42-43. Representation is not limited to removal proceedings, but also includes reunification and detention matters. *Id.*

¹¹⁹ Unaccompanied children are also entitled to educational services while they are engaged in their removal proceedings. Byrne & Miller, *supra* note 4, at 14.

¹²⁰ Julia Preston, *In a First, Judge Orders Legal Aid for Mentally Disabled Immigrants Facing Deportation*, N.Y. TIMES, April 24, 2013, at A18, available at <http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html> (last visited Aug. 24, 2013).

be more orderly and efficient hearings.¹²¹ With increasingly efficient hearings, children could spend less time in custody and judges could spend less time on each case. For example, children without a claim for relief from removal can be returned to their home countries sooner and more safely.¹²² If a child does not have a claim, an attorney can advise the child of this and negotiate with the ICE for a safe and efficient return.

Further, the appointment of counsel would not place an undue burden on the government as the government already provides non-attorney assistance to unaccompanied children in removal proceedings. The court in *Franco-Gonzalez* explained that because the government already contemplated the possibility of non-attorney assistance for that class of aliens, it was reasonable to provide the class members "meaningful access to a fair and participatory process" through the appointment of counsel.¹²³ Likewise, because the TVPRA already grants the HHS the authority to appoint non-attorney child advocates to trafficking victims and other vulnerable unaccompanied children, the provisions for additional legal assistance for all unaccompanied children would not be too great.

Even if unaccompanied children are entitled to government-funded counsel, pro bono programs can continue to grow and be supported. As the court in *Franco-Gonzalez* explained, even if a class has a right to counsel, the class members would need appointed counsel only if they could not afford counsel or if no pro bono counsel was available. In cities with established programs, pro bono services can continue to provide the majority of representation for unaccompanied children. In those areas where pro bono programs have not been established, unaccompanied children would be able to more easily access assistance.

Conclusion

In recent history, most major legislative acts relating to the treatment of unaccompanied children have recognized that unaccompanied children need assistance to understand and thread the immigration

¹²¹ See S. Rep. No. 113-40, at 124 (2013) (Judiciary Comm. Rep.), available at, <http://www.gpo.gov/fdsys/pkg/CRPT-113srpt40/pdf/CRPT-113srpt40.pdf> (The report of the Senate Judiciary Committee indicates that the provision mandating counsel for unaccompanied alien children was included in the Border Security, Economic Opportunity, and Immigration Modernization Act to "ensure that [removal] proceedings are more expeditious and cost-effective." Further, the appointment of counsel would reduce "frivolous appeals and claims.").

¹²² Young & McKenna, *supra* note 29, at 257.

¹²³ *Franco-Gonzalez*, No. 10-02211, at 12.

labyrinth.¹²⁴ Congress has the opportunity to create a statutory right as it attempts to pass comprehensive immigration reform. In June 2013, the Senate passed its comprehensive immigration reform package, which included a provision that would mandate counsel for all unaccompanied alien children and other vulnerable immigrants who are not represented by other counsel.¹²⁵ The Senate's bill would eliminate the "with no expense to the Government" phrase from the relevant sections of the INA that identify the alien's right to be represented.¹²⁶ Additionally, the bill would add language that mandates legal representation for unaccompanied alien children: "the Attorney General shall appoint counsel, at the expense of the Government if necessary, to represent an alien who has been determined . . . to be an unaccompanied alien child."¹²⁷ All unaccompanied children, whether in the custody of the ORR or in the custody of family members or sponsors, would be provided with legal representation if they were unable to arrange representation themselves. This provision, if passed by the House, is the final step needed to provide unaccompanied children the protections they need and to ensure a meaningful opportunity to participate in their removal process. The lack of representation is a source of concern and comprehensive immigration reform that mandates representation for all unaccompanied children would be a step toward answering the concerns raised by lack of representation.

¹²⁴ See 8 U.S.C. § 1362 (2012); Homeland Security Act, 6 U.S.C. § 279(b)(1)(A) (2012); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

¹²⁵ S. 744, 113th Cong. § 3502(a) (2013).

¹²⁶ *Id.* See 8 U.S.C. § 1362 (2012).

¹²⁷ S. 744, 113th Cong. § 3502(c) (2013).